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No. 237

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

STATE OF ILLINOIS,
Petitioner

vs.

COMMONWEALTH EDISON COMPANY, et al,
Respondents-Plaintiffs,

and

ALLIS-CHALMERS MANUFACTURING COMPANY, et al,
Respondents-Defendants

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENTS-PLAINTIFFS IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. 11-19) is reported at 207 F. Supp. 252. The opinion of the court of appeals (Pet. 20-25) is reported at 315 F.2d 564.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1963. The petition for a writ of certiorari was filed on June 25, 1963. Petitioner is invoking the jurisdiction of this Court under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the two courts below were correct in holding that petitioner, having failed to meet the specific requirements of Rule 24(a) of the Federal Rules of Civil Procedure, may not intervene of right in these actions as the claimed representative of consumers of the respondents-plaintiffs doing business in Illinois.[1]

STATUTES INVOLVED

Federal Rules of Civil Procedure:

> Rule 24. *Intervention.*
>
> (a) [as amended December 27, 1946, effective March 19, 1948] *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof . . . .
>
> (28 U.S.C. 1958 ed., Rule 24.)

Clayton Act:

> Section 4. *Suits by persons injured; amount of recovery.*

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[1] In the courts below, a second issue raised by petitioner was whether it was entitled to intervene permissively under Rule 24(b)(2) of the Federal Rules of Civil Procedure as a purchaser of electrical equipment. The district court denied petitioner's motion to so intervene and the court of appeals held that the trial court had not abused its discretion. This issue is not raised in the petition for writ of certiorari so that this Court's review is not sought with respect to it.

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
>
> (15 U.S.C., Section 15.)

The pertinent provisions of the Illinois Public Utilities Act are set forth in the Appendix, infra, pp. 10-16.

STATEMENT

The pertinent facts may be set forth as follows:

On July 31, 1961, and October 6, 1961, the respondents-plaintiffs, all of which are investor-owned public utilities, brought eighteen related actions in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to recover treble damages under the antitrust laws of the United States in connection with purchases of electrical equipment from the respondents-defendants. It is alleged in the complaints that each plaintiff, as a purchaser of a designated type of electrical equipment, was injured as a result of a combination and conspiracy, in violation of Section 1 of the Sherman Act (15 U.S.C. §1), among certain manufacturers of such equipment. The conspiracy alleged is the fixing of prices, allocation of markets and submission of collusive bids with the effect that higher levels of prices were paid by the plaintiffs for the electrical equipment than would have been paid absent such conspiracy. (R. 4-17.)[2]

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[2] "R" references are to the separate appendix to the petitioner's brief in the United States Court of Appeals for the Seventh Circuit.

On November 24, 1961, petitioner filed motions for leave to intervene as a party plaintiff in these actions as a claimed representative of the consumers of the public utilities doing business in Illinois.[3] (R. 18-19.)

All respondents (both plaintiff and defendants) opposed the petitioner's motions to intervene. They contended, among other things, that petitioner failed to meet the requirements of Rule 24(a) of the Federal Rules of Civil Procedure.

The district court disallowed petitioner's motions to intervene and the court of appeals affirmed. Both courts held that petitioner was not entitled to intervention of right under Rule 24(a), having failed to come within the terms of that Rule.

ARGUMENT

Rule 24(a) of the Federal Rules of Civil Procedure sets forth the requirements for intervention of right in actions pending in the federal district courts. The question presented to the courts below was whether the petitioner had met these requirements. The negative holdings of both courts do not create a conflict of circuits or other ground warranting review by this Court. Moreover, the issue was resolved correctly by the two courts below.

1. A primary requirement of Rule 24(a) is that the applicant have an "interest" in the subject of the litigation. It is well settled that consumers of regulated utilities have no standing under the antitrust laws to maintain actions for injuries to the utilities. (*Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922); see also, *United States Navigation*

[3] Of the nine plaintiff utilities in these actions, four operate in the State of Illinois. All four are subject to the jurisdiction of the Illinois Commerce Commission.

Co., Inc. v. *Cunard Steamship Co., Ltd.*, 284 U.S. 474 (1932); *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U.S. 500 (1936)) and hence lack the requisite "interest" to intervene in antitrust actions brought by the utility (*Philadelphia Electric Co.* v. *Westinghouse Electric Corp.* (and related cases); 1961 CCH Trade Cases Par. 70,143 (E.D. Pa. October 23, 1961); affirmed, 308 F.2d 856 (3d. Cir. 1962), certiorari denied, 372 U.S. 936 (1963)).

In the *Keogh* case, a shipper brought an action for treble damages, alleging that certain railroads had violated the Sherman Act by agreeing upon rate increases and that such agreed-upon rates were higher than the rates would have been "if competition had not been thus eliminated." All of the relevant rates had been approved by the Interstate Commerce Commission. In an opinion by Justice Brandeis, this Court denied recovery of damages, holding that the legal rights of the shipper are measured by the published tariff and that since the shipper had paid the published rates, it could not claim injury in its business or property within the meaning of the antitrust laws. In the instant case, it is not disputed that the rates paid by consumers of the respondent-plaintiff utilities were the legal rates established by the Illinois Commerce Commission.

In the *Westinghouse Electric Corp.* cases (*Philadelphia Electric Co.* v. *Westinghouse Electric Corp.* (and related cases), 1961 CCH Trade Cases par. 70,143 (E.D. Pa. October 23, 1961), affirmed, 308 F. 2d 856 (3d Cir. 1962), certiorari denied, 372 U.S. 936 (1963)), the Public Utility Commission of the State of Pennsylvania, acting as agent or representative of electricity consumers, was denied leave to intervene in the antitrust treble damage actions brought by the Philadelphia Electric Company against manufacturers of electrical equipment. The courts held that the con-

sumers and hence the Utility Commission could not establish the requisite "interest" for invoking the provisions of Rule 24.

Clearly, the consumers whom the petitioner purports to represent in these cases have no "interest" in the subject matter of the litigation in which intervention is sought and, accordingly, the petitioner as their representative has no such "interest."[4]

Petitioner (Pet. 5-6) misconceives the *Keogh* holding. *Keogh*, as noted, stands for the proposition that any injury to utility consumers in a situation like the present could only arise from unduly high rates and charges for services provided by the utility, not from antitrust violations. Petitioner's treatment (Pet. 5-6) of factual differences between *Keogh* and the case at bar is irrelevant. Petitioner's assertion (Pet. 7) that the "lower courts remain uninstructed by this tribunal on the question when, if at all, consumers may assert their rights under the antitrust laws" is clearly incorrect in the light of *Keogh*.

2. In an attempt to gain intervention of right irrespective of the specific requirements of Rule 24(a), petitioner argues

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[4] Further, contrary to petitioner's suggestion (Pet. 6 and again at Pet. 8 by inference), there is nothing in the record or in the opinion of the court below conceding that the consumers paid increased rates as a result of the alleged price fixing conspiracy of the respondents-defendants. In fact, the court below stated (Pet. 24): "Although these rates [established as legal by the Illinois Commerce Commission] may be determined to have been unreasonable because of conspiratorially fixed equipment costs which went into the basic rate structure, that is another issue not cognizable in these antitrust actions." To determine the extent, if any, to which prices paid for equipment involved in these cases affected various rate bases and depreciation allowances and, therefore, rates to consumers, would require a detailed examination of each component of such rate bases. No such examination has been made here. Obviously, a properly authorized regulatory agency, in this case the Illinois Commerce Commission, is the appropriate body to undertake such examinations if it becomes necessary to do so.

that intervention in these cases is the sole avenue for protection of its interests and that of the consumers. (Pet. 8-9.)

The difficulty with this position is, first of all, that it fails to recognize that Rule 24 does not confer rights or interests which otherwise do not exist. As the court of appeals observed (Pet. 24): "To put it differently, the question whether the State of Illinois, in behalf of its consumers, can as of right intervene may be answered by posing another question which underlies and its vital to the first. The underlying question is: Could the State of Illinois bring a direct action against defendants? The answer is 'No'. . . ." Clearly, the State could not since the consumers whom it seeks to represent have no standing to sue.

The contention (Pet. 9) that if intervention is not allowed respondents-plaintiffs will benefit from any recovery to the exclusion of the consumers who have allegedly borne the loss is irrelevant and not the subject of this litigation as the *Keogh* case makes clear.[5] To suggest that it is rele-

[5] We note that petitioner misconceives the scope of the Illinois Public Utilities Act and the nature of the rate-making process. Rates are not automatically increased to reflect plant additions such as those which were the subject of purchases by the plaintiffs from the defendants. Further, the Illinois Commerce Commission clearly has authority to deal adequately with the interests of the consumers which might arise as a result of these cases. The pertinent provisions of the Illinois Public Utilities Act by which this authority is granted are set forth in the Appendix, infra, pp. 10-16. The constitutional inhibition against reliance upon past profits or excess revenues as a justification for lower utility rates is not relevant here, where plaintiffs may in the future recover substantial amounts from the defendants which the Commission may then direct the plaintiffs to account for as state regulatory policies suggest is appropriate. Similarly, it is not responsive to cite state statutory inhibitions against reparations covering a lengthy period of past time when in addition to its authority to order refunds under some circumstances, the Commission may fashion rate and accounting orders (after expert study of complicated circumstances) which afford "just and reasonable" future treatment to rate payers.

vant is to suggest that a consumer or representative of consumers may intervene in any case in which a public utility stands to lose or recover a sum of money. Such a proposition is manifestly indefensible here as in any such case.

3. Petitioner's argument (Pet. 10) that the court of appeals has misconstrued the so-called *"res judicata"* requirement of Rule 24(a)(2) is a patent effort to conjure up reasons for review by this Court. The court of appeals specifically stated in its opinion (Pet. 23-23) that it was unnecessary for it to reach the question of whether "the applicant is or may be bound by a judgment in the action" and hence never passed on this matter. The district court simply stated in its memorandum opinion (Pet. 13) that: "The State does not earnestly argue that the consumers will be bound by any judgment or order herein and readily admits that 'plaintiffs' consumer-customers are not parties to this suit and, therefore, under the principles of *res judicata* are not bound . . . '."

CONCLUSION

The decisions below do not announce any new or important principles of law, do not create a conflict among circuits, and do not deal with questions of basic importance in the administration of the antitrust laws. For these

reasons, the petition for a writ of certiorari should be denied.

Respectfully sumitted,

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APPENDIX

1961 Illinois Revised Statutes, Chapter 111⅔:

Section 8. [as amended by act approved July 8, 1955, L. 1955, p. 1242] *Supervision of utilities—Examination —Non-public business of utility—Rules and regulations —Hearings pending legislation—Report of Commission.*

The commission shall have general supervision of all public utilities, except as otherwise provided in this Act, shall inquire into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with the provisions of this Act and any other law, with the orders of the commission and with the charter and franchise requirements.

* * * * * * * * *

The commission shall have power to adopt reasonable and proper rules and regulations relative to the exercise of its powers, and proper rules to govern its proceedings, and to regulate the mode and manner of all investigations and hearings, and to alter and amend the same.

* * * * * * * * *

Section 9. *Utilities to comply with requests and to obey orders of commission.* Every public utility shall furnish to the Commission all information required by it to carry into effect the provisions of this Act, and

shall make specific answers to all questions submitted by the Commission.

* * * * * * * * *

Whenever required by the Commission, every public utility shall deliver to the Commission, any or all maps, profiles, reports, documents, books, accounts, papers and records in its possession, or in any way relating to its property or affecting its business, and inventories of its property, in such form as the Commission may direct, or verified copies of any or all of the same.

Every public utility shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the Commission in the matters herein specified, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, rule or regulation by all of its officers, agents and employees.

[The Commission has the broadest authority over the establishment, form, auditing and inspection of accounts of the Illinois public utilities including specifically depreciation accounts and the appropriate ite or rates of depreciation to be allowed each utility under its jurisdiction. (Sections 11 to 19 inclusive.)]

Section 35. *No service to be rendered until schedules filed and published.*

No public utility shall undertake to perform any service or to furnish any product or commodity unless or until the rates and other charges and classifications, rules, and regulations relating thereto, applicable to such service, product or commodity, have been filed and published in accordance with the provisions of this Act * * *

Section 37. *Charging more or less than published rates.*

Except as in this Act otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product, or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates or other charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time, * * * nor shall any public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates or other charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons.

Section 39. *Discrimination—Rebates—Free passage of commission members and employees.*

No public utility, or any officer or agent thereof, or any person acting for or employed by it, shall directly or indirectly, by any device or means whatsoever, suffer or permit any corporation or person to obtain any service, commodity, or product at less than the rate or other charge then established and in force as shown by the schedules filed and in effect at the time. * * * *

Section 41. *Commission to fix rates and regulations.*

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges, or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, contracts,

or practices, or any of them, affecting such rates or other charges, or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provisions of law, or that such rates or other charges or classifications are insufficient, the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

The Commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate or other charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates or other charges, classifications, rules, regulations, contracts and practices, or any thereof of any public utility, and to establish new rates or other charges, classifications, rules, regulations, contracts or practices or schedule or schedules, in lieu thereof.

Section 64. *Investigations and hearings.*

The Commission, or any commissioner, assistant commissioner, or officer of the Commission designated by the Commission, shall have power to hold investigations, inquiries and hearings concerning any matters covered by the provisions of the Act, or by any other Acts, relating to public utilities subject to such rules and regulations as the Commission may establish. In the conduct of any investigation, inquiry or hearing neither the Commission nor any commissioner, assistant commissioner or officer of the Commission shall be bound by the technical rules of evidence, and no informality in any proceeding or in the manner of taking testimony before the Commission, any commissioner, assistant commissioner or any officer of the

Commission shall invalidate any order, decision, rule or regulation made, approved, or confirmed by the Commission. All hearings conducted by the Commission shall be open to the public.

* * * * *

[Section 64, 1961 Illinois Revised Statutes, Chapter 111⅔, appears as Section 60 of the Illinois Public Utilities Act.]

Section 67. *Right to inspect books and property and to examine agents of public utilities.*

The Commission, each commissioner, assistant commissioner and each officer and employee of the Commission properly authorized thereby shall have the right, at any and all times to inspect the papers, books, accounts and documents, plant, equipment or other property of any public utility, and the Commission, each commissioner, assistant commissioner, and any officer of the Commission authorized to administer oaths shall have power to examine under oath any officer, agent or employee of such public utility in relation to any matter within the jurisdiction of the Commission. * * *

* * * *

[Section 67, 1961 Illinois Revised Statutes, Chapter 111⅔, appears as Section 63 of the Illinois Public Utilities Act.]

Section 72. *Action to set aside orders of commission—Jurisdiction.*

Within thirty days after the service of any order or decision of the Commission refusing an application for a rehearing of any rule, regulation, order or decision of the Commission, or within thirty days after the service of any final order or decision of the Commission upon and after a rehearing of any rule, regulation, order or decision of the Commission, any person or corporation affected by such rule, regulation, order or decision, may appeal to the

circuit or superior court of the county in which the subject-matter of the hearing is situated, or if the subject-matter of the hearing is situated in more than one county, then of any one of such counties, for the purpose of having the reasonableness or lawfulness of the rule, regulation, order or decision inquired into and determined. * * * *

* * * * * * *

[Section 72, 1961 Illinois Revised Statutes, Chapter 111⅔, appears as Section 68 of the Illinois Public Utilities Act.]

Section 76. *Reparation for overcharge—Investigation of claims against public utilities.*

When complaint has been made to the Commission concerning any rate or other charge of any public utility and the Commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

* * * * * * *

All complaints for the recovery of damages shall be filed with the Commission within one year from the time the produce, commodity or service as to which complaint is made was furnished or performed, and a petition for the enforcement of an order of the Commission for the payment of money shall be filed in the proper court within one year from the date of the order, except that if an appeal is taken from the order of the Commission, the time from the taking of the appeal until its final adjudication shall be excluded in computing the one year allowed for filing the petition to enforce such order.

The remedy provided in this section shall be cumulative, and in addition to any other remedy or remedies in this Act provided in case of failure of a public utility to obey a rule, regulation, order or decision of the Commission.

The Commission shall have power to receive complaints regarding loss or damage occasioned by a public utility, and to make inquiry as to the methods of adjusting such claims. All claims against any public utility for loss of, or damage to property, or for any other loss or damage, in connection with a public utility service, not covered by the preceding paragraphs of this section, if not acted upon within ninety days from the date of the filing of the claim with the public utility, may be investigated by the Commission, in its discretion, and the results of such investigation shall be embodied in a special report which shall be open to public inspection.

[Section 76, 1961 Illinois Revised Statutes, Chapter 111⅔, appears as Section 72 of the Illinois Public Utilities Act.]